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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 445.

SOUTHERN CALIFORNIA EDISON COMPANY, a corporation,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee,

SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA,
Real Parties in Interest.

Motion of Southern California Gas Company and Southern Counties Gas Company of California to Dismiss Appeal; and Supporting Brief.

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Appellee,

SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA,
Real Parties in Interest.

Motion of Southern California Gas Company and Southern Counties Gas Company of California to Dismiss Appeal; and Supporting Brief.

Southern California Gas Company and Southern Counties Gas Company of California* hereby move the Court, pursuant to rule 16, Revised Rules of the Supreme Court of the United States, to dismiss the appeal herein.

This motion is made upon the following, and separately upon each of the following grounds:

1. The appeal does not present a substantial federal question.

*The two moving parties are named in the caption of the notice of appeal as "Real Parties in Interest." They are entitled to be treated as, and are in fact, appellees for reasons that are set forth in a motion to correct caption filed by them concurrently herewith.

2. None of the federal questions sought to be reviewed was, and the record does not show that it was, expressly passed on.

3. None of the federal questions was, and the record does not show that it was, timely or properly raised below.

4. The judgment rests upon an adequate non-federal basis.

5. The appeal is not within the jurisdiction of this Court.

The facts upon which this motion is based are set forth in the supporting brief, annexed hereto; and they are by this reference incorporated herein.

Dated: October 12, 1962.

Respectfully submitted,

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Brief in Support of Motion of Southern California Gas Company and Southern Counties Gas Company of California to Dismiss.

Opinion Below.

There was no opinion of the Supreme Court of the State of California. The Public Utilities Commission—whose decision the Supreme Court declined to review—filed two opinions. The first opinion, issued December 28, 1960, is printed as Exhibit "C" to the "Petition for Writ of Review or, in the alternative for a Writ of Mandamus"[1] filed in the court below by appellant. A supplemental opinion, issued June 6, 1961 after a further hearing had been had, is printed as Exhibit "A" to the Petition. Review in the state Supreme Court, and here, was sought only of the latter decision.

Statement of the Case.

The complete record that was before the court below was designated by appellant in its notice of appeal for transmission to this Court. Nonetheless, there is in the jurisdictional statement hardly a supporting reference to the record for the many assertions of fact contained in the statement. We mention this fact because a very large number of appellant's assertions of fact are outside the record that was before the court below. Instead of noting each one of these instances it will be simpler

[1]Hereinafter referred to simply as "Petition."

merely to present our own statement of the case, appropriately referenced to the record.[2]

Southern California Gas Company and Southern Counties Gas Company of California (hereinafter called "appellees") are public utility gas corporations engaged in distributing and selling gas at retail to the public at large in Southern California. Their customers number well over two million. [*Petition*, Exhibit "C," p. 2(n.1).] The appellant, Southern California Edison Company, is an electric public utility which purchases a part of its requirement of gas for boiler fuel from appellees on an interruptible basis. [*Petition*, Exhibit "C", pp. 28-29.] An interruptible industrial customer, such as appellant, is one whose service is subject to discontinuance if there is insufficient gas or capacity

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[2]We are not advised of the sequence in which the documents comprising the transcript of record forwarded to this Court were bound and paginated. Accordingly, our references will be to the document in question and the page thereof on which the referenced material is found. For that purpose we will use the following abbreviations for the documents listed at pages 2-3 of the "Notice of Appeal to the United States Supreme Court":

(1) Petition for Writ of Review or, in the Alternative, for a Writ of Mandamus, including exhibits —*"Petition."*

(2) Memorandum of Points and Authorities in Support of Petitions, etc., including appendices and verification —*"Memo."*

(3) Letter dated August 4, 1961, etc. —*"Letter."*

(4) Answer of respondent Public Utility Commission, etc. —*"Com. Ans."*

(5) Answer and Brief of Southern California Gas Company and Southern Counties Gas Company of California, etc. —*"Gas Cos. Ans."*

(6) Brief of City of Los Angeles in Opposition, etc. —*"L.A. Br."*

(7) Reply of petitioner to briefs in opposition, etc. —*"Reply"*

(8) Notice of Appeal to the United States Supreme Court —*"Notice"*

at the time to supply the needs of firm customers. Appellees serve about 1900 interruptible customers. [*Petition*, Exhibit "C", p. 17.]

In 1958 appellees applied to the Public Utilities Commission of the State of California for a certificate that public convenience and necessity required the construction, operation and maintenance by them of the California section of the so-called Rock Springs Project, *i.e.*, a 34-inch pipeline and related facilities between a point on the California-Nevada border and appellees' distribution system, for the transportation of natural gas from Kansas, Oklahoma, Rocky Mountain and ultimately Canadian, sources, bought at the border from El Paso Natural Gas Company (hereinafter called "El Paso"). The gas will be distributed to the public at large by appellees. [*Petition*, Exhibit "C", pp. 2-3, 32.] Hearings were had by the Commission upon that application. Among the various interested parties who appeared at those hearings and thus became a party to the certification proceeding was the appellant. It took the position that because of efforts on its part to get a direct and non-interruptible supply of gas a part of its custom might be lost to appellees; and that the possible loss of this custom should be considered by the Commission in determining whether the Rock Springs Project was economically feasible. All the interested parties including appellant were fully heard. [*Petition*, Exhibit "C", pp. 3, 18, 28-29. *Ibid.*, Exhibit "A", pp. 1-2, 10.]

On December 28, 1960 the Commission made its order granting the requested certificate of public convenience and necessity but upon certain conditions. [*Petition*, Exhibit "C", pp. 47-49.] That order was

based upon an extended written opinion and express and specific findings of fact. [*Petition*, Exhibit "C", pp. 1-47.] In the opinion the commission summarized the evidence and the respective positions taken by the parties, including in adequate detail the position there taken by the present appellant. [*Petition*, Exhibit "C", pp. 28-29.] It analyzed and weighed the evidence, indicating in the course of that process its view of the facts, the conclusions at which it had arrived and the reasoning that led it to those conclusions. The effect of a possible loss of appellant's business upon the economic feasibility of the project was noted and considered. [*Petition*, Exhibit "C," pp. 28-29, 35.] And the Commission's order was set forth at length. [*Petition*, Exhibit "C," pp. 47-49.]

So far as relevant here the conditions imposed on the certification order were: (1) that appellees obtain a new supply contract with El Paso, acceptable to them and the Commission that would (a) eliminate the need for a rate increase as a result of the project during its early years; (b) reduce the period before the project would become economically feasible; and (c) provide a load-building period and schedule of gas importation that would maintain a reasonable balance in the two-fuel (gas and oil) economy of Southern California; and (2) that appellees file a revised economic feasibility study showing the economic outlook approximately as of the date of the new supply contract. [*Petition*, Exhibit "C", pp. 47-49.]

Thereupon appellees revised their supply contract with El Paso and filed with the Commission a "Statement of Compliance With Conditions and Request For Issuance of Supplemental Order Authorizing Construction." It was alleged in that Statement and shown by appropriate facts and data, that appellees had complied with all of the conditions on certification imposed by the Commission in its order of December 28, 1960. [*Petition*, Exhibit "A", pp. 1, 2-4.] A hearing was then had by the Commission, at which appellant appeared and was fully heard. [*Petition*, Exhibit "A", pp. 1-2, 10.] On June 6, 1961 the Commission made an order in which it expressly found that appellees had complied with all the previously imposed conditions on certification and that the new supply contract was acceptable to the Commission. It also found that the new contract (a) eliminated the necessity for a rate increase as a result of the project; (b) reduced the period before the pipeline project would be economically feasible; (c) provided a loadbuilding period and a schedule of gas importation that would maintain a reasonable balance in the two-fuel (oil and gas) economy of Southern California. There was also a finding that appellees had prepared and filed a revised economic-feasibility study which showed the economic supply-and-requirements situation as of the date of the new contract. [*Petition*, Exhibit "A", pp. 11-12.] The effect upon the economic feasibility of the project of a possible loss of appellant's business was discussed and

considered by the Commission. [*Petition,* Exhibit "A," pp. 5-6.] So, it was concluded, the certificate of public convenience and necessity theretofore granted was and should be made applicable to the pipeline project as revised by the Statement of Compliance. [*Petition,* Exhibit "A", pp. 13-15.]

Pursuant to the California practice, appellant sought to have this order reviewed by the State Supreme Court by petitioning that court for the issuance of a writ of review. It was the only order in the case that appellant sought to have reviewed. The petition was opposed by appellees on various state grounds. On January 31, 1962 appellant's petition for a writ of review was denied without opinion.[3] The order of denial became final on March 2, 1961. [*Cal. Rules of Court,* rule 24(a); 57 Adv. Cal. 44.][4]

Appellant did not at any time during the hearings before the Commission join in any motion, or itself move, to consolidate those hearings with any other pending proceeding or to hold a comparative hearing. Such a motion was made by the Commission Staff in the last days of the hearing and, after the evidence had been closed and the cause submitted, by another party. [*Peti-*

[3] The order or judgment from which this appeal is taken was not designated by appellant for inclusion in the transcript sent to this Court. [*See, Notice,* pp. 2-3.] It has, however, been included as an appendix to the Statement as to Jurisdiction.

[4] The cited rule, so far as relevant, reads as follows:

> ". . . A decision of the Supreme Court becomes final 30 days after filing unless prior to the expiration of said 30-day period either a shorter time, or an additional period of time not to exceed 30 days, is ordered by the court. . . ."

tion, Exhibit "A," pp. 8; 9.] Both motions were denied. [*Petition*, Exhibit "A," p. 13.] After the order here involved was issued by the Commission appellant petitioned for a rehearing. It did not assign denial of the consolidation motions as error or as a ground for rehearing. [*Petition*, Exhibit "E," pp. 1-12, *passim*.]

For some time past, and certainly before and during the Commission hearings of the instant cause, appellant has been seeking to get for itself by direct procurement a non-interruptible supply of out-of-state gas to use as boiler fuel [*Petition*, Exhibit "C", pp. 18, 28-29.] These efforts culminated in the so-called "Pemex" project by which, if it is certificated, appellant will receive on a non-interruptible basis a supply of gas from the Gulf Coast area that will be transported by pipeline to it and used by it as boiler fuel in Southern California. Just before the first decision in the instant cause was issued by the Commission, and after the hearing on which that decision was based had been completed, appellant and California Gas Transmission Company filed an application with the California Commission for a certificate that public convenience and necessity required the operation and maintenance by them of a pipeline for the transportation to appellant of the Gulf Coast gas to which we have just referred.[5] [*Petition*,

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[5]Appellees filed their application for certification of the California part of the Rock Springs project November 7, 1958. [*Petition*, Ex. "C," p. 2.] The hearing of the application began January 13, 1959, and ended July 29, 1960. [*Ibid.*, Ex. "C,"

Exhibit "C", pp. 19-20, 43 (n.15). *Memo.*, pp. 4-5.] This is the application that led belatedly to the claim that a comparative hearing should be had.

It was appellant's contention in the instant proceeding before the Commission that upon certification of the Pemex project a part of its fuel needs would be supplied through it thus obviating to that extent the necessity of procurement of gas from appellees; and that this circumstance should be considered in determining the economic feasibility of the pipeline that appellees were seeking to have certificated. [*Petition*, Exhibit "C", pp. 28-29, 35. *Ibid.*, Exhibit "E", pp. 8-9.]

In the record presented to the state Supreme Court to support appellant's petition for a writ of review it was not shown that the entire load being supplied by appellees to appellant would be lost as the result of certification of the Pemex project. Nor was it shown how much of the load would be lost on that account. It was only shown that some unspecified part of it would be lost; *i.e.*, that the Pemex project, if completed and certified, would transport "substantial quantities of natural gas . . . required for operation of certain of its [appellant's] steam-generating plants . . . ." [*Petition*, p. 5, para. VII.] On the other hand, the economic feasibility studies and other evidence presented by appellees showed the effect upon the project

p. 3.] The Commission's decision of the matters then heard was issued on December 28, 1960. [*Ibid.*, Ex. "C," p. 49.] The application for certification of the Pemex project was not filed until December 5, 1960. [*Petition*, p. 5, para. VII.]

of an assumed loss of appellant's business. [*Petition*, Exhibit "A", pp. 4-6.] The Commission took this evidence into account, found that its previously imposed conditions had been complied with and that the certificate of public convenience and necessity should issue.* [*Petition*, Exhibit "A," pp. 6, 10-14. See also, pp. 13-16, *infra*.]

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*"Economic feasibility" as such is merely one of the evidential elements entering into the ultimate determination of public convenience and necessity. In the California practice, findings of fact are determinations of ultimate fact, not recitations of evidential or probative facts; consequently, it is not generally required that the evidential facts or subordinate elements entering into the ultimate fact be separately found upon. Such elements are deemed resolved in favor of the ultimate fact found. [*Monson & Co. v. Pearson*, 199 Cal. 295, 304, 249 Pac. 191, 196; *Southern Pacific Co. v. Railroad Com.*, 13 Cal. 2d 89, 108-109, 87 P. 2d 1055, 1064-1065; *Southern Calif., etc., Lines v. Public Util. Com.*, 35 Cal. 2d 586, 592, 220 P. 2d 393, 397-398.] Furthermore, it is the California rule that the lower tribunal is deemed to have found impliedly every fact necessary to support the judgment that can be inferred from the findings it made expressly and the judgment it rendered. [*Anglo-Calif. T. Co. v. Oakland Railways*, 193 Cal. 451, 460-461, 225 Pac. 452, 455; *San Diego & Coronado Ferry Co. v. Railroad Com.*, 210 Cal. 504, 508-509, 292 Pac. 640, 642.] To the extent that economic feasibility was an element of, or necessary to, a finding of public convenience and necessity the Commission must be deemed to have found that the Rock Springs project was economically feasible.

ARGUMENT.

I.

The Questions Raised Are Not Substantial.

1. Detailed Opinions Filed by the Commission Fully Disclosed Its Determination of the Litigated Issues of Fact.

The question whether a failure by the Commission to make findings of fact would be a denial of due process is not substantial because the Commission made adequate findings. The question, therefore, does not arise on this record. It is one that need not be decided.

First: The purpose of any requirement for special findings of fact is, of course, that there might be made known the tribunal's determination of the principal issues litigated. That disclosure need not always take the form of formal findings of fact. Indeed, in the federal courts, where special findings of fact and conclusions of law separately stated are mandatory [F.R.C.P., rule 52(a)], it has long been the rule, without any thought or suggestion that due process was being denied, that the failure to make formal findings is immaterial if there is an opinion or memorandum of decision in which the court states its conclusions with respect to the issues of fact. [*Marconi Wireless Teleg. Co. v. United States*, 320 U.S. 1, 58; *Hazeltine Corp. v. General Motors Corp.*, 3 Cir., 131 F. 2d 34, 37; *Burnham Chem. Co. v. Borax Consolidated*, 9 Cir., 170 F. 2d 569, 574, *cert. den.*

336 U.S. 924; *Green Valley Creamery v. United States*, 1 Cir., 108 F. 2d 342, 347.][7]

As has been noted [see, p. 3, *supra*], the commission issued two opinions in this cause. Those opinions disclose with adequate fullness the determinations of fact made by the commission. That is especially so in respect of the question of fact with which appellant is mainly concerned, *i.e.*, whether the Rock Springs project would be economically feasible assuming that appellant's requirements of gas were satisfied from sources other than the appellees. [See, Statement As To Jurisdiction, pp. 11-12, 15-16.]

In its first opinion the commission, after a detailed recitation and consideration of the evidence and the contentions of the parties, expressly said: "Looking at the project from the short term (first 7 years) the project does not appear economically feasible . . ." [*Petition*, Exhibit "C", p. 34.] It went on to show the bases of that conclusion by pointing out, among other things, that appellees' studies of economic feasibility included the full gas requirements of all interruptible customers, although three of the largest customers, including appellant, had given notice they would not permit automatic renewal of their contracts. [*Petition*, Exhibit "C", p. 35.] For this and other reasons, the commission found that the disadvantages of the project outweighed its advantages unless appellees could get a new contract from El Paso that would

[7] All of the cases cited were decided before the 1946 amendment to F. R. C. P., rule 52(a) which added a specific provision permitting an opinion or memorandum of decision to serve in place of formal findings of fact.

improve the economic feasibility of the project. [*Petition*, Exhibit "C", pp. 44-48.] Accordingly, it granted a certificate of public convenience and necessity but subject to compliance with certain conditions designed to accomplish that improvement. [*Petition*, Exhibit "C," pp. 46-49.]

After the compliance hearing had been concluded the commission issued another opinion. [*Petition*, Exhibit "A".] It was there noted, with respect to economic feasibility, that evidence had been introduced to show the impact upon appellees of "the possible loss of Edison [appellant's] load. . . ."[5] [*Petition*, Exhibit "A," p. 5.] In the event of that loss, the Commission continued, the result would be a revenue deficiency in the first five years of the project; but after "the first four years the growth in the firm load should be such as largely to offset the effect of complete loss of Edison load." [*Petition*, Exhibit "A," pp. 5-6.] It was the Commission's express finding, therefore, that appellees had complied with the conditions previously imposed. Accordingly, the certificate of public convenience and necessity previously granted conditionally was made unconditional. [*Petition*, Exhibit "A," pp. 11-15.]

Thus it adequately appears from the commission's opinions that it determined that the project would be economically feasible even if all of appellant's gas busi-

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[5]It was not shown at any time that all of the Edison load would be lost to appellees; but only that some unspecified part of it *might* be lost. [See, pp. 10-11, *supra*.]

ness were lost to appellees. That is especially so when due regard is given to the following facts:

(1) The conditions imposed were concerned with the question of economic feasibility; (2) the conditions were found to have been complied with; (3) the certificate was made unconditional after consideration had been given to evidence of the effect on the project of loss of appellant's business, whereas theretofore the Commission had had some doubts on the score of economic feasibility engendered in part by the possibility of such a loss; and, (4) it was expressly noted that the revenue deficit that might be caused by that loss would be made up.

The Commission's findings must be read, of course, as they would be read in California by a state court. There it would be held that the Commission will be deemed to have found every fact tending to support its order that was reasonably inferable from the express findings and order it made. [See, note 6, *supra*. Also, *Triangle Conduit etc. Co. v. Federal Trade Com.*, 7 Cir., 168 F. 2d 175, 179, *aff'd.*, 336 U.S. 956.]

Second: If formal findings were necessary, such findings on all issues material to the judgment appealed from *were made*.

The proceeding below, out of which this appeal arises, was an application by the appellees to the state Public Utilities Commission for a certificate that public convenience and necessity required the construction, operation and maintenance by them of a certain

pipeline for the transportation and sale of gas for light, heat and power. The principal, indeed the only issue involved in that proceeding was whether public convenience and necessity so required. The Commission expressly found that it did and, accordingly, ordered the certificate issued subject, however, to certain specified conditions. [See, pp. 5-6, *supra*.] Economic feasibility was merely an evidential or subordinate element entering into that determination. [See, note 6, p. 11, *supra*.] No review of that order was sought by anyone.

Appellees then revised the project and their contract with El Paso in the respects required by the conditions on the certificate imposed by the Commission. They informed the Commission of their compliance and requested the making of a supplementary order authorizing it to proceed with the construction of the pipeline.[9] A hearing was had at which the only issue litigated was whether appellees had complied with these previously imposed conditions. The Commission found expressly and *seriatim* that appellees had complied with all of the conditions. [See, pp. 6-8, *supra*.] It, therefore, ordered that the certificate theretofore granted be made applicable to the new contract and project as revised by appellees' compliance with the conditions. That is the order, and the only order, that appellant sought to have reviewed by the state Supreme Court. It is the order involved in the instant appeal.

Obviously, as findings on the principal or material issues were in fact made, the question whether a failure to make them would be a denial of due process does not arise.

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[9] One of the previously imposed conditions was that construction not be started until authorized by supplemental order. [*Petition*, Ex. "C," p. 48 (No. 4).]

2. The Requisite Bases for a Comparative Hearing—i.e. Mutual Exclusivity and Timeliness of Application—Were Not Established.

The hearings of this case before the Commission went on for 29 days during a period of one year and seven months. [*Petition*, Exhibit "C," p. 3. *Ibid.*, Exhibit "A," pp. 1-2.] Some time during the last four days of hearing; and long after the certificate had been conditionally granted, the Commission Staff moved to consolidate appellees' application with the then pending application by appellant to certify the Pemex project. [*Petition*, Exhibit "A," p. 8.] Appellant did not join in the motion. The Pemex application had been pending since only December 5, 1960, whereas the hearing on the Rock Springs project had begun on January 13, 1959. [*Petition*, p. 5; *Ibid.*, Exhibit "C," p. 3.] After all hearings on appellees' application had been completed and the matter submitted for decision, California Gas Transmission Company moved to reopen the hearing and consolidate the proceeding with the Pemex application. [*Petition*, Exhibit "A", p. 9.] Appellant did not join in this motion either. Both motions were denied. That denial was well within the discretion vested in the Commission. It raises no substantial federal question.

First: Appellant was not denied, but had, a hearing on the question of the asserted conflict between its and the appellees' applications. The basis of the procedural device of a consolidation for a comparative hearing—the so-called Ashbacker doctrine, see *Ashbacker v. Federal Commun. Com.*, 326 U. S. 327—is the necessity of preserving to an applicant for a license or permit to engage in a business activity the opportunity ac-

corded him by the licensing statute to be fairly heard on the merits of his application. When, therefore, two applications that are mutually exclusive are pending it will be a denial of the statutory right to a hearing to grant only one of them without hearing both, thus in effect denying the ungranted one without a hearing. Since the applications are mutually exclusive and cannot both be granted, the granting of one is in necessary effect a denial of the other.

That was not the situation here, because the two applications were not shown to be mutually exclusive. [See, pp. 5, 8-10, *supra.*] That was, however, the situation in *Ashbacker, supra,* 326 U. S. 330-331; and, accordingly, that was the situation that impelled this court to say, ". . . We only hold that where two bona fide applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity [to have a hearing] which Congress chose to give him." [326 U. S. at 333.] At bar, however, the other applicant (appellant) was given and availed itself of the opportunity to be heard in opposition to the assertedly conflicting application. It had the opportunity to present and did present to the Commission in the hearings that resulted in the granting of appellees' application everything it cared to offer by way of showing that its, rather than appellees' application should be preferred. [See, pp. 5, 7-8, 10-11, *supra.*]

Second: It is clear from this Court's statement of its holding in *Ashbacker, supra,* 326 U. S. at 333, as well as from the decisions generally [see, *e.g., Eastern Air Lines v. Civil Aero. Bd.,* 2 Cir., 271 F. 2d 681, 685; *Western Air Lines v. Civil Aero. Bd.,* 9 Cir., 184

F. 2d 545, 549-550] that the comparative hearing device comes into operation only if the two pending applications are in fact mutually exclusive. That essential fact was not alleged or claimed by appellant to exist in the instant case. [*Petition*, pp. 1-13, *passim*.] Indeed, in its petition for rehearing before the Commission, and as well in its brief in the state Supreme Court appellant virtually conceded that the two projects were not mutually exclusive but could co-exist.[10] [*Petition*, Exhibit "E," p. 5; *Memo.*, p. 24.]

That concession is in accord with the facts. The two projects are not designed to serve the same purpose. The Rock Springs project will bring gas from various fields in Kansas, Oklahoma, the Rocky Mountain area, and ultimately Canada, delivered by El Paso to appellees who, in turn, will distribute it to the public at large. Pemex, however, will bring gas from wholly different fields, delivered by California Gas Transmission Com-

[10] In the petition for rehearing appellant, discussing the two projects, said:

> ". . . while we believe that it is entirely possible that upon proper records this Commission may conclude that it can and should certificate both projects . . . we must anticipate a contention . . . that . . . the Commission's said Decision No. 62117 was not intended to be so construed. [*Petition*, Ex. "E," p. 5.]

Similarly in its brief in the State Supreme Court appellant also said:

> ". . . It is true that there has been evidence presented before the Commission in both [Pemex and Rock Springs] proceedings, indicating the California market may be able to utilize both of these supplies. [Cits.] While we believe that it is entirely possible that, upon a proper record, the Commission may conclude that it can and should certificate both projects, Petitioner [appellant] is in simple fairness and justice, entitled to have disclosed what the Commission has in fact concluded upon this vital issue. . . ." [*Memo.*, p. 24.]

pany to appellant for the latter's use as boiler fuel. Even if Pemex results in the complete loss of appellant as a customer of appellees, the latter serve millions of people who need and use gas. The gas delivered by the Rock Springs project will still be needed and availed of. [*Petition*, Exhibit "C", pp. 9-12. *Petition*, Exhibit "A", pp. 5-6.] There was absent, therefore, that mutual exclusivity that is the foundation upon which an order for a comparative hearing must rest.

Third: It has become firmly established that the problem of the order in which applicants should be heard, and whether contemporaneously or successively, is one for the discretion of the administrative agency concerned. [*Federal Commun. Com. v. WJR*, 337 U. S. 265, 272, 283; *United Air Lines v. Civil Aero. Bd., supra*, 228 F. 2d at 19; *Eastern Air Lines v. Civil Aero. Bd.*, App. D.C., 243 F. 2d 607, 609; *Western Air Lines v. Civil Aero. Bd., supra*, 184 F. 2d at 550; Davis, *Administrative Law Treatise* (1958), vol. 1, pp. 572, 573.] The absence of a showing of mutual exclusivity, the untimeliness of the request for a consolidation [see note 5, p. 9, *supra*], and the absence of any showing that the issues, parties and evidence involved in the two applications with which we are here concerned, are or would be the same, all support the exercise below of the Commission's discretion to deny the request made in the instant case. Surely, the question whether, in the circumstances peculiar to this case alone, that discretion was wisely exercised is not a question of such substantiality as to be entitled to invoke the interposition of this Court.

Fourth: No doubt the state statute here involved gives appellant the right to a hearing on its application for certification of the Pemex project. Whether the right to such a hearing entitles it to have its application consolidated with an earlier application that has already been heard and is at the decision stage when the request for consolidation is made is plainly a question of procedure governed by state law. It is a question without federal implications of any kind.

3. Appellant Is Without Standing to Complain of the Denial of Another Party's Motion for Consolidation.

The appellant has no standing to raise the question relating to consolidation for comparative hearing. That question, therefore, is not substantial for it arises in a context that makes it unnecessary, indeed improper, for this Court to decide it in the instant cause. ". . . it is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case . . ." [*Burton v. United States*, 196 U. S. 283, 295.] There is no such necessity when the question is raised by a party without standing to raise it. [See cases cited p. 22, *infra*.]

Appellant did not make or join in the making of any motion to consolidate hearing of the Rock Springs application with later hearing of the Pemex application. Denial of such a motion made by a co-party was not a ruling of which, under the state practice, appellant could complain, as we show in a moment. [See, p. 25, *infra*.] The making of that ruling was not a violation of any federal right inhering in appellant, if indeed it was a violation at all. *Vis-a-vis* the motion to consoli-

date and its denial, appellant was a stranger. [*Cf., Williams v. Eggleston*, 170 U. S. 304, 309.] Appellant did not seek a consolidation. The failure to consolidate, therefore, did not affect or change in any way the course of the proceeding to which appellant was committed. So far as any action by appellant is concerned the Rock Springs hearing would not have been consolidated with any other. It was apparently willing to have the Rock Springs hearing proceed independently of Peale. Thus it is plain that appellant suffered no direct injury as a consequence of the ruling. It has, therefore, no standing to raise or complain of the ruling as an asserted denial of federal right. [See, *Premier-Pabst Sales Co. v. Grosscup*, 298 U. S. 226, 227; *Moore Ice Cream Co. v. Rose*, 289 U. S. 373, 383; *Concordia Fire Ins. Co. v. Illinois*, 292 U. S. 535, 540; *Heald v. District of Columbia*, 259 U. S. 114, 123.]

4. Judicial Review Is Provided by the Statute and Was Had in the Instant Case.

Appellant's complaint of an absence of opportunity for judicial review is without substantiality. Judicial review of decisions of the Commission are provided by statute. [*Cal. Pub. Util. Code*, secs. 1756-1760, Statement As To Jurisdiction, Appendix "B", pp. 12-13.] Such a review was had by appellant.

First: The California statutes, except for provisions relating to stays which are immaterial here [*Cal. Pub. Util. Code*, secs. 1764-1767], are set out at length at pages 12-13 of Appendix "B" to the Statement As To Jurisdiction. They expressly provide a procedure by which review of decisions of the Commission may

be had in the highest court of the state. That review is discretionary only in the sense that certiorari is discretionary in the practice of this Court. And, however that may be, it is clearly no denial of due process that review is made dependent upon the appellate court's preliminary determination that the case is one that merits further attention on the part of the reviewing court. [See, *National Union of Marine Cooks v. Arnold* 348 U. S. 37, 41, 43; *People v. Western Air Lines*, 42 Cal. 2d 621, 632, 268 P. 2d 723, 729, *app. dis.* 348 U. S. 859. *Cf., Dorsey v. Gill*, App. D. C., 148 F. 2d 857, 877-878, *cert. den.* 325 U. S. 890; *Anderson v. Heinze*, 9 Cir., 258 F. 2d 479, 482, *cert. den.* 358 U. S. 889.]

Second: In the California practice denial of a "petition for review of an order of the commission is a decision on the merits both as to the law and the facts presented in the review proceedings. [cit.] This is so even though the order of this [state] court is without opinion . . . . ." [*People v. Western Air Lines, supra*, 42 Cal. 2d at 630-631, 268 P. 2d at 729; *Southern Calif. Edison Co. v. Railroad Com.*, 6 Cal. 2d 737, 747, 59 P. 2d 808, 812.] This Court has recognized that to be the California practice. [*Napa Valley Co. v. Railroad Com.*, 251 U. S. 366, 372-373.] Appellant, therefore, was not deprived of, but had, a judicial review of the order of the Commission of which it complains; and so has not been denied either due process or equal protection.

II.

The Judgment Rests Upon an Adequate Non-Federal Basis.

1. Assuming that the questions now raised were presented and decided as federal questions below, there were independent state grounds urged by appellees that were adequate in themselves under the state practice to impel and support the state court's denial of review. This Court is without jurisdiction to review a judgment that rests on adequate and independent state grounds. [*Edelman v. California*, 344 U. S. 357, 361-362; *Herb v. Pitcairn*, 324 U. S. 117, 125.] The record here does not show that the state court's judgment was not based on the state grounds that were urged by appellees. [See, Statement as to Jurisdiction, Appendix "A".] The failure of the record so to show makes it impossible to find in favor of jurisdiction of this appeal. The denial of the petition for a writ of review without opinion should be regarded as having rested on those grounds. Jurisdiction must be shown affirmatively; it cannot rest on conjecture or debatable inference. [*Citizens Nat. Bank v. Durr*, 257 U. S. 99, 106; *Stembridge v. Georgia*, 343 U. S. 541, 547-548; *Durley v. Mayo*, 351 U. S. 277, 281, 284-285; *Forbes v. State Council*, 216 U. S. 396, 399; *Phyle v. Duffy*, 334 U. S. 431, 444; *Bailey v. Anderson*, 326 U. S. 203, 206-207; *Ellis v. Dixon*, 349 U. S. 458, 460.]

2. The assertion of error in the denial of the motions for a comparative hearing was met by appellees with the contention, based on state law, that the appellant had no standing to raise or maintain the question because it had not made or joined in the motion [*Gas*

Cos. Ans., p. 55 (*Fourth*)]; and the further contention, also based on state law, that denial of the motions that were made rested within the sound discretion of the Commission because (a) the showing in support of them was insufficient to show that the proceedings with which consolidation for hearing was sought were so similar to or comparable with the proceeding in which the motions were made in respect of parties, issues and evidence as to justify consolidation; and (b) the motions were not seasonably made but were so belatedly made as, if granted, to delay unduly the pending proceeding. [*Gas Cos. Ans.*, pp. 45-53-55.]

Each of these was an adequate and independent state ground upon which the state court could have based, and for all this record shows did base, its judgment. It is settled in California that one not making or joining in a motion cannot complaint of error in denying a motion made by a co-party. [*Calderwood v. Brooks*, 28 Cal. 151, 153; *Meda v. Lawton*, 214 Cal. 588, 590, 7 P. 2d 180, 181. *Cf.; Delger v. Jacobs*, 19 Cal. App. 197, 206, 125 Pac. 258; *Mock v. Santa Rosa*, 126 Cal. 330, 347-348, 58 Pac. 826; *Fisher v. Nash Bldg. Co.*, 113 Cal. App. 2d 397, 404, 248 P. 2d 466, 470-471.] Essentially this is the same rule invoked by this Court in *Puget Sound Power & L. Co. v. King County*, 264 U. S. 22, 25, in which it was held that it was too late for a party who did not raise the federal question in the lower court to raise it by joining in the assignment of errors of another party who did raise the question below.

So, too, is it settled that the granting and denial of a motion to consolidate—a "comparative hearing" is, of course, a form of consolidation of actions for hearing—

rests within the discretion of the tribunal to whom addressed [*Fisher v. Nash Bldg. Co., supra,* 113 Cal. App. 2d at 402, 248 P. 2d at 470. See, also, *Federal Communications Com. v. WJR, supra,* 337 U. S. at 272, 283.] It is not an abuse of that discretion to deny the motion when to grant it will unduly delay the pending hearing [see, *Beaudreau v. Allen,* 102 Cal. App. 2d 552, 556-557, 227 P. 2d 986]; or when the showing in its support fails to establish identity or similarity of parties, issues or evidence between the causes sought to be consolidated.[11]

3. Throughout the proceedings in the state supreme court appellees insisted that the record presented by appellant was incomplete and inadequate, in that it brought up only a small and obviously garbled part of the evidence taken and other proceedings had before the Commission; that it was the appellant's burden properly to allege or otherwise present the facts that entitled it to the remedy of a writ of review; and that its petition, because of the incompleteness of the factual showing made, did not show that it was entitled to the remedy sought. [*Gas Cos. Ans.*, pp. 3-4, 8 (n. 3), 28, 89-90.] For all that appears in the record presented to this Court the state supreme court may have denied the petition for a writ of review on this ground. Appellant has not shown that the denial was not so grounded and, therefore, has not met its burden of showing jurisdiction affirmatively. [See, cases cited, p. 24, *supra.*] Of

[11]Appellant did not include in the record it presented to the state Supreme Court and upon which it based its petition for a writ of review either its application in Peniex, appellees' application in Rock Springs, or any other pleading in the two proceedings.

course, a federal question arising in a state tribunal must be raised in accordance with the state's procedure; and a failure to comply with that procedure is in itself an independent state ground adequate to support the judgment in the case. [*Stembridge v. Georgia, supra*, 343 U. S. at 547; *Holley v. Lawrence*, 317 U. S. 518; *Edelman v. California*, 344 U. S. 557, 358-359.]

III.

The Questions Here Raised Are Reviewable, if at All, Only by Certiorari, Not Appeal, as Those Questions Do Not Involve the Asserted Repugnancy to Federal Law of a Statute of the State but Only of Some Intermediate Procedural Rulings in the Course of Decision of a Public Utility Certification Case.

There is not drawn in question here the validity of a state statute on the ground of its repugnancy to the constitution, treaties or laws of the United States. This Court, therefore, is without jurisdiction by way of appeal. [28 U.S.C.A., sec. 1257 (2); *Wilson v. Cook*, 327 U. S. 474, 480; *United States Ship. Bd. etc. Corp. v. Sullivan*, 261 U. S. 146, 148-149.]

We may assume that for jurisdictional purposes the certification order of the state commission is deemed to be an act of the legislature. [See, *Atchison etc. Ry. Co. v. Public Utilities Commission*, 346 U. S. 346, 348, and cases there cited.] But that is not the order that is drawn in question here. What is drawn in question are two intermediate, procedural rulings that do not depend in any way on the validity or invalidity of the certification order, *i.e.*, denial of a motion to consolidate the hearing of appellees' certificate application with a

later hearing on appellant's application for certification of a wholly different project; and the asserted failure of the commission to make findings of fact. These are rulings typically of a judicial nature. There is nothing legislative about them. In California the Public Utilities Commission is not exclusively a legislative body. Its functions are in substantial part judicial in nature. [*Southern Pacific Co. v. Railroad Com.*, 194 Cal. 734, 738, 231 Pac. 28, 29 (holding award of reparation for excessive rates to have been judicial in nature); *City of San Jose v. Railroad Com.*, 175 Cal. 284, 290, 165 Pac. 967, 969; *People v. Lang Transp. Co.*, 217 Cal. 166, 170, 17 P. 2d 721; *People v. Western Air Lines*, 42 Cal. 2d 621, 630, 268 P. 2d 723.]

The instant case is unlike *Atchison etc. Ry. Co. v. Public Utilities Commission, supra*, 346 U. S. 346, and the decisions upon which it relied. There what was drawn in question was the validity of the commission's final and definitive order—the order that conclusively determined the rights of the parties—not just an incidental and collateral procedural ruling. Our case is more nearly like *Alabama & Vicksburg Ry. Co. v. Journey*, 257 U. S. 111, in which a writ of error was dismissed, the violation of federal law there claimed not being in the judgment under review but in an intermediate ruling sustaining a demurrer to a plea in abatement.

Our case is also like those cases in which there was drawn in question not the validity of an underlying statute but only the manner and method of an exercise of authority under it, and in which, therefore, review was held to be available if at all only by certiorari. [*Wilson v. Cook, supra*, 327 U. S. at 480; *Hanson v.*

Denckla, 357 U. S. 235, 244; *Jett Bros. Co. v. City of Carrollton*, 252 U. S. 1, 6.]

The legislative act here involved was the granting by the Commission of a certificate of public convenience and necessity. That was done in its first decision, of which review was not sought in the state supreme court and is not sought here. The decision of which review is sought is a supplemental one holding that compliance had been had with the conditions previously imposed on the certificate. That circumstance also differentiates the case at bar from those of which *Atchison etc. Ry. Co. v. Public Utilities Commission*, *supra*, 340 U. S. 346 is an exemplar.

The cases cited by respondent at page 7 of its jurisdictional statement as sustaining the jurisdiction of this Court do not do so. They are distinguishable in material respects. In none of them was there involved an incidental and collateral procedural order as distinguished from the definitive order of a legislative character and which was the order whose repugnancy to federal law was drawn in question. Thus, in *Truax v. Corrigan*, 257 U. S. 312, no question of jurisdiction was raised or discussed. The question there was whether this Court could go behind the findings of a state court to determine whether it had erroneously denied a claimed federal right. The claim of federal right was seasonably made below and passed on by the state court and it was that precise claim that was drawn in question here. Similarly, in *Southern R. Co. v. Virginia*, 290 U. S. 190, no question of jurisdiction was raised or discussed. The validity of the definitive order of the commission had there been drawn in question on federal grounds in the state court; and it was that same question that was

presented here. The appeal in *Napa Valley Elec. Co. v. Railroad Commission*, 251 U. S. 366, was not from a state court but from a United States District Court. The question, both below and here, was whether the denial by the state supreme court of a petition to review a rate order was *res judicata* of a suit in the federal court to set the order aside as repugnant to the federal constitution. No question of jurisdiction was raised or discussed.

The only one of the cases cited by appellant in which jurisdiction was discussed is *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282. There the validity of an act of the Kentucky legislature was specifically and expressly drawn in question in the state court; and it was that same issue that was presented here.

Surely, when this Court was given control of its docket by the legislation that severely limited the class and number of cases that could be brought here by direct appeal [Act of Feb. 13, 1925, 43 Stat. 936] it was not intended that this limitation should be purely formal and largely meaningless. The great purpose that this legislation was designed to serve [see, *Ex parte Republic of Peru*, 318 U. S. 578, 585(n.4)] can be frustrated in large measure if every procedural and intermediate ruling of a regulatory commission or board is treated as a legislative act, whose validity under federal law is drawn in question simply because the validity under federal law of the final or definitive order or judgment is challenged.[12]

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[12] A forceful exposition of the strong reasons in policy against any such expansion of this Court's appellate jurisdiction is found in the dissenting opinion of Mr. Justice Brandeis in *Dahnke-*

IV.

There Is No Properly Presented Federal Question in This Cause Because the Jurisdictional Statement Does Not Comply With Rule 15(d).

In a jurisdictional statement prepared conformably to the requirements of Rule 15(d) of this Court's rules, the answers to the following questions should be readily found: (1) At what stage of the proceedings in the tribunal of first instance were the federal questions sought to be reviewed raised? (2) In what manner or by what method were they raised? (3) In what way were they passed upon by the court below? (4) Where specifically in the record does the matter appear that is relied upon to support the assertion that the rulings of the court below were such as to bring the case within the jurisdiction of this Court?

The answers to those questions are not to be found in the jurisdictional statement filed in the case at bar. The Statement shows only that one of the four questions stated by appellant [*Statement As To Jurisdiction*, pp. 8-9] was raised—and that one but slantingly—in its petition for rehearing before the Commission.[13] [*Statement As To Jurisdiction*, p. 16.] It does not show when before that time, if at all, or how, even that question was raised. There is nothing to show when or how the other questions were raised before the Commission.

Walker Milling Co. v. Bondurant, supra, 257 U. S. at 298-299. It is, we respectfully suggest, an exposition to which heed should be given today.

[13] What was raised was not the question whether denial of a comparative hearing was an infringement of any constitutional right of appellant, but whether decision of the pending certificate application before completion of hearings on the Pemex application would be a prejudgment of the latter.

Similarly, the Statement does not show that any of the questions were presented to or passed upon by the state Supreme Court.[14]

So, too, there are no references to the record where appears the matter relied upon to support the assertion that the rulings of the court below were such as to bring the case within the jurisdiction of this Court. The only ruling made by the court below was to deny the petition for a writ of review. This it did without opinion.[15]

This failure to comply with Rule 15(d) [formerly rule 12, para. 1] is sufficient by itself to justify dismissal of the appeal. [*Twisp Mining etc. Co. v. Chelan Min. Co.*, 320 U. S. 705; *Genz v. Washington*, 332 U. S. 748; *City Bus Co. v. Mississippi*, 299 U. S. 520.]

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[14]All that the statement shows is that in the petition for a writ of review there was complaint that certain findings were ambiguous, not that findings had not been made or that due process was denied appellant by the failure to make them; and that appellant had been denied due process by an alleged prejudgment of its Pemex application. [*Statement as to Jurisdiction*, p. 18.]

[15]The judgment of the state Supreme Court having been without opinion, it cannot be told whether any federal question was necessarily, or at all decided. Indeed, since there were independent state grounds upon which decision could have rested, and nothing to the contrary affirmatively appears, it must be assumed that decision was rested on those grounds rather than on determination of any federal question. [See cases cited, p. 24, *supra*.]

Conclusion.

The motion to dismiss the appeal should be granted and the appeal dismissed.

Respectfully submitted.

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